Supreme Court, U.S.
FILED
AUG 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 87-1207

In The

Supreme Court of the United States

October Term, 1987

RAY WILL,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF STATE POLICE AND DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

AMICUS BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENTS

W. J. Michael Cody
Attorney General and Reporter
State of Tennessee

*Michael W. Catalano
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3499

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

Honorable Don Siegelman
Attorney General of Alabama

Honorable Robert K. Corbin
Attorney General of Arizona

Honorable John Steven Clark
Attorney General of Arkansas

Honorable John Van de Kamp
Attorney General of California

Honorable Duane Woodard
Attorney General of Colorado

Honorable Joseph Lieberman
Attorney General of
Connecticut

Honorable Charles M. Oberly
Attorney General of Delaware

Honorable Robert Butterworth
Attorney General of Florida

Honorable Warren Price, III
Attorney General of Hawaii

Honorable Neil F. Hartigan
Attorney General of Illinois

Honorable Linley E. Pearson
Attorney General of Indiana

Honorable Thomas J. Miller
Attorney General of Iowa

Honorable Robert T. Stephan
Attorney General of Kansas

Honorable Frederic J. Cowan
Attorney General of Kentucky

Honorable William J. Guste, Jr.
Attorney General of Louisiana

Honorable J. Joseph Curran, Jr.
Attorney General of Maryland

Honorable Hubert H.
Humphrey, III
Attorney General of Minnesota

Honorable Michael C. Moore
Attorney General of Mississippi

Honorable William L. Webster
Attorney General of Missouri

Honorable Mike Greely
Attorney General of Montana

Honorable Robert M. Spire
Attorney General of Nebraska

Honorable Stephen E. Merrill
Attorney General of
New Hampshire

Honorable Hal Stratton
Attorney General of
New Mexico

Honorable Lacy H. Thornburg
Attorney General of
North Carolina

Honorable Nicholas Spaeth
Attorney General of
North Dakota

Honorable Anthony J.
Celebrezze, Jr.
Attorney General of Ohio

Honorable Robert Henry
Attorney General of Oklahoma

Honorable LeRoy S.
Zimmerman
Attorney General of
Pennsylvania

Honorable Hector Rivera-Cruz
Attorney General of
Puerto Rico

Honorable Travis Medlock
Attorney General of
South Carolina

Honorable Roger A.
Tellinghuisen
Attorney General of
South Dakota

Honorable David L. Wilkinson
Attorney General of Utah

Honorable Jeffrey Amestoy
Attorney General of Vermont

Honorable Mary Sue Terry
Attorney General of Virginia

Honorable Kenneth O. Eikenberry
Attorney General of Washington

Honorable Charlie Brown
Attorney General of West Virginia

Honorable Don J. Hanaway
Attorney General of Wisconsin

Honorable Joseph B. Meyer
Attorney General of Wyoming

QUESTION PRESENTED

Whether a state or its officers, acting in their official capacities, are "persons" subject to suit in state court under 42 U.S.C. § 1983?

TABLE OF CONTENTS

	Page
INTEREST OF AMICI STATES	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. UNDER THE PRINCIPLES OF STATUTORY CONSTRUCTION, IT MUST BE CONCLUDED THAT THE FORTY-SECOND CONGRESS DID NOT INTEND THE TERM "PERSON" UNDER § 1 OF THE CIVIL RIGHTS ACT OF 1871 TO INCLUDE STATES OR ITS OFFICERS ACTING IN THEIR OFFICIAL CAPACITIES	6
II. THIS COURT'S DECISIONS SUPPORT THE CONCLUSION THAT STATES OR ITS OFFICERS ACTING IN THEIR OFFICIAL CAPACITY WERE NOT INTENDED BY THE 42ND CONGRESS TO BE PERSONS UNDER 42 U.S.C. § 1983	17
CONCLUSION	23

TABLE OF AUTHORITIES

Cases Cited:	Page
Adler v. L.A. Unified School District, 159 Cal. Rptr. 528 (1979)	2
American Commercial Lines v. Ostertag, 582 S.W. 2d 51 (Ky.App. 1979)	3
Alberty v. Daniel, 25 Ill.App.3d 291, 323 N.E.2d 110 (1974)	2
Alvarado v. City of Dodge City, 10 Kan.App.2d 363, 702 P.2d 935 (1985)	2
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	14
Beers v. Arkansas, 61 U.S. 991 (1858)	14
Board of Trustees of Weston County School District No. 1 v. Holso, 584 P.2d 1009 (Wy. 1978)	2
Brody v. Leamy, 393 N.Y.Supp.2d 243, 90 Misc.2d 1 (1978)	2
California v. Taylor, 353 U.S. 553 (1957)	20
Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969)	3
Chisholm v. Georgia, 2 Dall. 419 (1794)	12, 15, 16, 17
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	8
Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316 (1961)	7
De Bleecker v. Montgomery County, 427 A.2d 1075, *reversed on other grounds*, 438 A.2d 1348 (Md. 1983)	2
Durango School District No. 9-R v. Thorpe, 200 Colo. 268, 614 P.2d 880 (1980)	2

TABLE OF AUTHORITIES—Continued

Page

Edelman v. Jordan, 415 U.S. 651 (1974) 18

Endress v. Brookdale Community College, 144 N.J. Super. 109, 364 A.2d 1080 (App. Div. 1976) 2

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 17

Ford Motor Co. v. Indiana Dept. of Treasury, 323 U.S. 459 (1945) 22

Georgia v. Evans, 316 U.S. 159 (1942) 7

Hans v. Louisiana, 134 U.S. 1 (1890) 15

Hook v. Hook, 101 N.M. 390, 683 P.2d 507 (1984) 3

Hughes v. Livingston Parish School Bd., 459 S.2d 10, *writ denied for* 62 S.2d 1250 (1984) 2

Hunsaker v. Borden, 5 Cal. 288 (1855) 13

Hutto v. Finney, 437 U.S. 678 (1979) 21

Jackson v. Kurtz, 65 Ohio App.2d 152, 416 N.E.2d 1064 (1979) 2

Jones v. Schlender, 102 Ida. 776, 640 P.2d 1177 (1982) 3

Kentucky v. Graham, 474 U.S. 170 (1985) 23

Klesh v. Commonwealth Dept. of Public Welfare, 55 Penn. Commonwealth 587, 423 A.2d 1348 (1980) 3

Kristensen v. Strinder, 343 N.W.2d 67 (N.W.2d 67 (N.D. 1983) 2

Makanui v. Dept. of Education, 721 P.2d 165 (Ha. 1986) 2

Marshall v. Clark, 22 Tex. 23 (1858) 13

Martinez v. State of California, 444 U.S. 277 (1980) 3

TABLE OF AUTHORITIES—Continued

Page

McClanahan v. Cochise College, 25 Ariz.App. 13, 540 P.2d 744 (1975) 2

McIntyre v. Monarch Feed Mills, Inc., 276 Ark. 1, 631 S.W.2d 307 (1982) 3

Moore v. Molinari, 724 S.W.2d 860 (Tex. App. 1986) 2

Michigan State Bank v. Hastings, 1 Dougl. 225 (Mich. 1844) 13

Monell v. Dept. of Social Services, 436 U.S. 658

Monroe v. Pape, 365 U.S. 167 (1961) 20, 21

Myers v. Zanesville and M. Turnpike Co., 11 Ohio 273 (1842) 13

Ollstead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977) 3

Ohio v. Helvering, 292 U.S. 366 (1934) 7

Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964) 20

Penthouse, Inc. v. Sava, 399 S.2d 456 (Fla. 1979) 2

Perrin v. U.S., 444 U.S. 37 (1979) 7

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) 20

Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986) 3

Quern v. Jordan, 440 U.S. 332 (1979) 5, 17, 18, 19

Regan v. Wald, 468 U.S. 222 (1984) 8

Rezeznik v. Chief of Police of South Hampton, 374 Mass. 475, 373 N.E.2d 1128 (1978) 2

Rosacker v. Multnomah, 43 Ore.App. 583, 603 P.2d 1216 (1979) 2

TABLE OF AUTHORITIES—Continued

Page

Smith v. Michigan, 410 N.W.2d 749 (Mich. 1987) 3, 4, 11

Snuggs v. Stanly County Dept. of Public Health, 310 N.C. 739, 314 S.E.2d 528 (1984) 2

State Tax Comm'n v. Condren, 387 So.2d 712 (Miss. 1980) 2

State v. Tidwell, 32 Wash.App. 971, 651 P.2d 228 (1982) 2

Swenson v. Emerson Elec. Co., 374 N.W.2d 690 (Minn. 1985) 3

Terrell v. City of Bessemer, 406 So.2d 337 (Ala. 1981) 2

Terry v. Kolski, 78 Wisc.2d 475, 254 N.W.2d 704 (1977) 2

Thompson v. Medical Licensing Bd., 180 Ind.App. 333, 398 N.E.2d 679 *cert. denied*, 449 U.S. 937 (1979) 2

Thiboutot v. State, 405 A.2d 230, *aff'd* 448 U.S. 1 (1979) 2

Titus v. Progressive Glassworkers Union, 301 S.E.2d 577 (W.Va. 1983) 2

Tracy v. Hornbuckle, 8 Bush 336 (Ky. 1871) 13

Turner v. State, 27 Ark. 337 (1871) 13

Tyler v. Whitehead, 583 S.W.2d 240 (Mo. App. 1979) 2

U.S. v. California, 297 U.S. 175 (1936) 20

U.S. v. Champlin Refining Co., 341 U.S. 290 (1951) 7

Welch v. Texas Dept. of Highways, 107 S.Ct. 2941 (1987) 18

Westin v. Dana, 51 Me. 461 (1862) 13

TABLE OF AUTHORITIES—Continued

Page

Williams v. Register, 3 Tenn. 214 (1812) 13

Woonsocket Historical Society v. City of Woonsocket, 120 R.I. 259, 387 A.2d 530 (1978) 3

Wyman v. Popham, 252 Ga. 247, 312 S.E.2d 795 (1984) 2

Ex parte Young, 209 U.S. 123 (1908) 5, 6, 14, 21, 22

Ziska v. Water Pollution Control Authority, 195 Conn. 642, 490 A.2d 509 (1985) 2

STATE CONSTITUTIONAL PROVISIONS:

Alabama—Art. I, § 15 (1875) 13

Arkansas—Art. I, § 17 (1868) 13

California—Art. XI, § 11 (1849) 13

Kentucky—Art. VIII, § 6 (1850) 13

Illinois—Art. IV, § 26 (1870) 13

Indiana—Art. IV, § 24 (1851) 13

Pennsylvania—Art. IX, § 11 (1838) 13

South Carolina—Art. XIV, § 4 (1868) 13

Tennessee—Art. I, § 17 (1870) 13

West Virginia—Art. VI, § 35 (1845) 13

FEDERAL AUTHORITIES:

U.S. Const., Art. III, § 2 12

42 U.S.C. § 1983 ..... *Passim*

§ 2, Civil Rights Act of 1866 ..... 5, 10, 15

§ 17, Enforcement Act of 1870 10

§ 1, Civil Rights Act of 1871 ..... *Passim*

Congressional Globe, 42nd Cong., 1st Sess. (1871) 7, 8, 9, 17

No. 87-1207

In The

Supreme Court of the United States

October Term, 1987

RAY WILL,

Petitioner,

vs.

MICHIGAN DEPARTMENT OF STATE POLICE AND DIRECTOR OF STATE POLICE,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

AMICUS BRIEF OF THE STATES OF TENNESSEE, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI STATES

The amici states have a definite and substantial interest in the outcome of this case. At least 29 state appel-

late courts[1] have explicitly held that their respective jurisdictions have concurrent authority to hear actions based upon 42 U.S.C. § 1983. Additionally, courts in 8 other states have held that their state courts have concurrent jurisdiction with federal courts to enforce rights granted under a federal enactment unless there is a prohibition

---

1 *Terrell v. City of Bessemer*, 406 So.2d 337 (Ala. 1981); *McClanahan v. Cochise College*, 25 Ariz.App. 13, 540 P.2d 744 (1975); Adler v. L.A. Unified School District, 159 Cal.Rptr. 528 (1979); *Durango School District No. 9-R v. Thorpe*, 200 Colo. 268, 614 P.2d 880 (1980); *Ziska v. Water Pollution Control Authority*, 195 Conn. 642, 490 A.2d 509 (1985); *Penthouse, Inc. v. Sava*, 399 So.2d 456 (Fla. 1979); *Wyman v. Popham*, 252 Ga. 247, 312 S.E.2d 795 (1984); *Makanui v. Dept. of Education*, 721 P.2d 165 (Ha. 1986); *Alberty v. Daniel*, 25 Ill.App.3d 291, 323 N.E.2d 110 (1974); *Thompson v. Medical Licensing Bd.*, 180 Ind.App. 333, 398 N.E.2d 679, *cert. denied*, 449 U.S. 937 (1979); *Alvarado v. City of Dodge City*, 10 Kan.App.2d 363, 702 P.2d 935 (1985); *Hughes v. Livingston Parish School Bd.*, 459 So.2d 10, *writ denied*, 62 S.2d 1250 (1984); *Thiboutot v. State*, 405 A.2d 230, *aff'd* 448 U.S. 1 (1979); *DeBleecker v. Montgomery County*, 427 A.2d 1075, *reversed on other grounds*, 438 A.2d 1348 (Md. 1983); *Rezeznik v. Chief of Police of South Hampton*, 374 Mass. 475, 373 N.E.2d 1128 (1978); *State Tax Comm'n v. Vondren*, 387 So.2d 712 (Miss. 1980); *Tyler v. Whitehead*, 583 S.W.2d 240 (Mo.App. 1979); *Endress v. Brookdale Community College*, 144 N.J.Super. 109, 364 A.2d 1080 (App. Div. 1976); *Brody v. Leamy*, 393 N.Y.Supp.2d 243, 90 Misc.2d 1 (1978); *Snuggs v. Stanly County Dept. of Public Health*, 310 N.C. 739, 314 S.E.2d 528 (1984); *Kristensen v. Strinder*, 343 N.W.2d 67 (N.D. 1983); *Jackson v. Kurtz*, 65 Ohio App.2d 152, 416 N.E.2d 1064 (1979); *Rosacker v. Multnomah*, 43 Ore.App. 583, 603 P.2d 1216 (1979); *Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986); *Moore v. Molinari*, 724 S.W.2d 860 (Tex. App. 1986); *Titus v. Progressive Glassworkers Union*, 301 S.E.2d 577 (W.Va. 1983); *State v. Tidwell*, 32 Wash.App. 971, 651 P.2d 228 (1982); *Terry v. Kolski*, 78 Wisc.2d 475, 254 N.W.2d 704 (1977); *Board of Trustees of Weston County School District No. 1 v. Holso*, 584 P.2d 1009 (Wy. 1978).

from doing so.[2] At present, no state appellate courts in this country have refused to exercise concurrent jurisdiction over § 1983 claims.[3]

A number of state and federal courts have addressed the question of whether the state or its officers, in their official capacity, are "persons" under 42 U.S.C. § 1983 reaching opposite conclusions. *See Smith v. Michigan*, 410 N.W.2d 749 at 763-64 (Mich. 1988) (Brickley, J., concurring) (most state and federal appellate court decisions have held that the state is not a "person" for purposes of § 1983). Since the vast majority of states have explicitly recognized concurrent state court jurisdiction over § 1983 claims, this Court's resolution of the issue will have a significant impact on future civil rights litigation in state courts.

Did the 42nd Congress intend the term "person" in § 1 of the Civil Rights Act of 1871 (predecessor to § 1983)

---

2 *Ollstead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977); *McIntyre v. Monarch Feed Mills, Inc.*, 276 Ark. 1, 631 S.W.2d 307 (1982); *Jones v. Schlender*, 102 Ida. 776, 640 P.2d 1177 (1982); *American Commercial Lines v. Ostertag*, 582 S.W. 2d 51 (Ky.App. 1979); *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690 (Minn. 1985); *Hook v. Hook*, 101 N.M. 390, 683 P.2d 507 (1984); *Klesh v. Commonwealth Dept. of Public Welfare*, 55 Penn. Commonwealth 587, 423 A.2d 1348 (1980); *Woonsocket Historical Society v. City of Woonsocket*, 387 A.2d 530, 120 R.I. 259 (1978).

3 In *Martinez v. State of California*, 444 U.S. 277 (1980), this Court noted that it had "never considered . . . the question whether a state must entertain a claim under § 1983. . . . [Further stating] that where the same type of claim, if arising under state law, would be enforced in the state courts, state courts are generally not free to refuse enforcement of the federal claim. *Testa v. Katt*, 330 U.S. at 394, 67 S.Ct. at 814. *But see Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969)." *Id.* at 234 fn. 7 Amici states would note that the Supreme Court of Tennessee overruled the *Chamberlain* decision in *Poling v. Goins*, *supra*, at fn. 1.

to include a state or its officers in their official capacity, even though in 1871 the common law doctrine of state sovereign immunity and the Eleventh Amendment effectively barred suits against the state unless there was an express waiver by the state or abrogation by Congress? The amici states are in the unique position of being able to provide this court with insight in answering this question from their collective prospective.

STATEMENT OF THE CASE

The amici states adopt the statement of facts as presented by the Michigan Supreme Court, below, along with the statement of facts presented by the respondents in their brief. *See Smith v. Michigan*, 410 N.W.2d 749, 751-54 (Mich. 1987); Respondents' Brief, pp. 1-8.

SUMMARY OF ARGUMENT

Under the principles of statutory construction, it must be concluded that Congress did not intend the term "person" under § 1983 to include states or their officials in their official capacity. Within the historical context of Reconstruction, the enactment of § 1 of the Civil Rights Act of 1871 (predecessor to § 1983) was intended to vest federal courts with jurisdiction to hear civil suits brought by individuals deprived of their constitutional rights by a "person" under color of law. This Court held in the

Quern decision that § 1983 suits cannot be brought against the state in federal court because of the Eleventh Amendment. Why would the 42nd Congress have intended "person" to include states in § 1983 actions brought in state court when jurisdiction was originally vested with federal courts in 1871 due to the inability or unwillingness of state courts to act in response to the lawlessness of the Ku Klux Klan at that time?

More importantly, in 1871 it was generally recognized by this Court and throughout the country that a state could not be sued in any court, state or federal. There were two exceptions to this common law principle: (1) where a state consented to be sued, or (2) where the Constitution expressly abrogated sovereignty of a state. The concept of express Congressional abrogation of state sovereignty pursuant to constitutional authority was not developed at the time of the enactment of the Civil Rights Act of 1871. There is no doubt that the Fourteenth Amendment authorized such Congressional abrogation; however, § 1 of that Act did not abrogate either the Eleventh Amendment or state common law sovereign immunity. Since no relief could be obtained against the state in either state or federal court, the conclusion is inescapable that Congress did not intend states to be "persons" under § 1983.

Likewise, state officials being sued in their "official capacity" were not intended to be "persons" under § 1983. The notion of "official capacity" suits was not recognized until 1908 by this Court in *Ex Parte Young*. The 42nd Congress could not even conceive of being able to bring suit against a state official as an indirect action against

the state. Damage actions could not and cannot be maintained against state officials in the "official capacity" in federal court (Eleventh Amendment) or state court (common law sovereign immunity). As for equity actions against state officials, this court in *Ex Parte Young,* although recognizing the necessity of the legal fiction, noted that such suits do not affect state sovereignty.

Amici states urge this Court to rely upon the historical context of the enactment of § 1 of the Civil Rights Act of 1871 as its touchstone in deciding this issue. Once the foundation of state sovereign immunity as it existed in 1871 is laid, the answer becomes clear: Congress did not intend the state or its officers, in their official capacities, to the "persons" under § 1983.

ARGUMENT

I. UNDER THE PRINCIPLES OF STATUTORY CONSTRUCTION, IT MUST BE CONCLUDED THAT THE FORTY-SECOND CONGRESS DID NOT INTEND THE TERM "PERSON" UNDER § 1 OF THE CIVIL RIGHTS ACT OF 1871 TO INCLUDE STATES OR ITS OFFICERS IN THEIR OFFICIAL CAPACITIES.

In construing the meaning of words in a statute, this Court has indicated in the past that the plain and ordinary understanding of that language should be employed.

Perrin v. U.S., 444 U.S. 37, 42 (1979). The term "person" in 42 U.S.C. § 1983 within the context of this case, however, is unclear and ambiguous. Therefore, reliance on any purported plain meaning of the term "person" is of no use. In order to determine congressional intent as to the meaning of that word, resort must be had to the principles of statutory construction.[4] In particular, there are two principles that are helpful in this instance.

First, this Court has indicated on a number of occasions that in construing acts of Congress, courts may look to the history of the times when the legislation was enacted to ascertain the reason as well as the meaning of particular provisions. *U.S. v. Champlin Refining Co.*, 341 U.S. 290, 292 (1951); *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 323 (1961). Likewise, this Court has indicated in other contexts that whether the terms "person" or "corporation" in a statute include a state or the United States, depends upon the context of the legislative environment. *Georgia v. Evans*, 316 U.S. 159, 161 (1942); *Ohio v. Helvering*, 292 U.S. 366, 370 (1934).[5]

---

[4] Although the petitioner indicates in the opening argument of his brief that the meaning of the term person in § 1983 is "a matter of ordinary statutory construction", no reference to any rules of statutory construction are made by the petitioner. Rather, the petitioner simply launches into a lengthy general discussion of the debate surrounding the enactment of the Civil Rights Act of 1871 interspersed with quotations from Senators and Representatives concerning the authority of Congress to enact §§ 2-6 of the Act which are of no value in determining congressional intent as to the meaning of "person" in 1 of the Act. Petitioner's Brief, pp. 9-22.

[5] In applying these rules of statutory construction to the term "person" as originally enacted in 1871, the amici states rely

(Continued on following page)

The second pertinent rule of statutory construction is that statements by legislators are not controlling as to statutory intent. *Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979). More specifically, this Court has indicated that oral testimony of congressmen during legislative debates, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the language of the statute itself. *Regan v. Wald,* 468 U.S. 222, 237 (1984). Thus, unless the statements of members of Congress during legislative debates as to the meaning of a particular word are specific to that word, those statements are of little value in ascertaining congressional intent.

In applying the first principle of statutory construction to § 1 of the Civil Rights Act of 1871, a discussion of the original purpose for § 1 will aid this Court in understanding why the 42nd Congress never intended states or their officers to be considered persons under that enactment. More importantly, a historical review of the doctrine of sovereign immunity from its origins in England to the mid-19th century in America, provides compelling evidence that the 42nd Congress could never have intended states or their officers to be subject to suit in either state or federal court under § 1 of the Civil Rights Act of 1871.

(Continued from previous page)

upon the state of the law as to sovereign immunity and the Eleventh Amendment as it existed at that time. Accordingly, references to post-1871 cases are omitted in this portion of the argument. However, subsequent decisions of this Court support amici states' position that the 42nd Congress did not intend states or the officers to be "persons" under § 1 of the Civil Rights Act of 1871. *See, infra,* pp. 16-22.

In the years following the Civil War, lawlessness in the states of the old Confederacy was rampant. At the center of this chaos was the Ku Klux Klan, which harassed and murdered both black persons and those white persons whose sentiments lay with the Union. By 1871, President Ulysses S. Grant knew that the federal government would have to take action. Thus, on March 23, 1871, President Grant sent the following message to Congress:

> A condition of affairs now exists in some of the states of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. *That the power to correct these evils is beyond the control of the state authorities I do not doubt;* that the power of the executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation in the judgment of Congress shall effectively secure life, liberty, and property in the enforcement of law in all parts of the United States. (Emphasis added).

Congressional Globe, 42nd Cong., 1st Sess. 236 (1871) (Cong. Globe).

It should be remembered that by the time of President Grant's message in 1871, the Thirteenth, Fourteenth, and Fifteenth Amendments had been adopted; moreover, Congress had enacted the Civil Rights Act of 1866, the Enforcement Act of 1870, and the Enforcement Act of 1871. However, President Grant in the language of his message, felt that an emergency situation existed in the South which needed additional federal legislation. Presi-

dent Grant's reference to the lack of control by state authorities is further supported throughout the debates by examples of where state authorities, including state courts, were unwilling or unable to control the lawlessness. In that regard, Representative Stoughton stated the following:

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst government on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The state authorities and local courts are unable or unwilling to check the evil or punish the criminals.

Cong. Globe, 321 (1871) (Rep. Stoughton).

Congressional reaction to these horrors was the enactment the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. Sections 2 through 6 of the Act dealt specifically with the emergency situation in the South. More specifically, § 2 of the Act made it a crime for two persons to conspire together to violate the civil rights of another person.[6]

On the other hand, § 1 of the Act was simply the civil version of the provision in the Civil Rights Act of 1866 which made it a crime for any person under color of law to violate the civil rights of another person. § 2, Civil Rights Act of 1866; § 17 Enforcement Act of 1870. In particular, § 1 of the Civil Rights Act of 1871 provided the following:

---

[6] In fact, most of the debates relating to the Civil Rights Act of 1871 concerned whether Congress had the authority to enact such a provision. *Monell v. Dept. of Social Services*, 436 U.S. 658, 667 (1978).

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state shall subject or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities to which, as such citizens, he is entitled under the Constitution or the laws of the United States, shall, any such laws, statute, ordinance, regulation, custom or usage of the state to the contrary notwithstanding be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, etc.

It is quite clear that Congress intended to provide individuals who were victims of civil rights deprivations in the South with a civil remedy in federal court. State court judges were unwilling or unable to provide relief to these victims; accordingly, Congress vested jurisdiction to enforce these rights with federal courts.[7] In establishing this new remedy, did Congress intend that individuals could bring suits under § 1 against a state or its officers in their official capacities?

The answer to this question lies in a historical review of the development of sovereign immunity and the Eleventh Amendment. The common law doctrine of sovereign immunity originated in England under the simple principle that "the king could do no wrong". Accordingly,

---

[7] It appears that Congress originally intended federal jurisdiction in 1871 to be exclusive. *Smith v. Dept. of Public Health*, 410 N.W.2d at 755 (Brickley, J., concurring). Why would Congress have intended states or their officers to be "persons" for purposes of § 1983 actions in state court when state courts originally had no jurisdiction to hear § 1983 claims?

the king could not be sued in his own courts without his consent. *Chisholm v. Georgia,* 2 Dall. 419, 437-46 (1794) (Iredell, J., dissenting).

The ratification of the Constitution in 1788 established the federal court system and authorized the federal judiciary to entertain actions involving the states, but only in the following circumstances:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made under their authority—to all cases effecting ambassadors, other public ministers and counsuls; to all cases of admirality and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states and between a state or the citizens thereof and foreign states, citizens or subjects.

U.S. Const., Art. III, § 2.

The question arose as to whether the language "controversies between a state and citizens of another state" authorized federal courts to entertain lawsuits filed by a citizen of one state against another state. This question was answered in the case of *Chisholm v. Georgia,* 2 Dall. 419 (1794) in which this Court held that the State of Georgia was subject to a suit by a citizen of the State of South Carolina for a revoluntionary war debt. In essence, this Court recognized the sovereignity of the State of Georgia; however, when the State of Georgia ratified the Constitution, it agreed to the terms of the Constitution which included federal jurisdiction over actions by citizens of one

state against another state. In other words, the Constitution, by its express terms, abrogated state common law sovereign immunity. The immediate reaction to the *Chisholm* decision in this country was the adoption of the Eleventh Amendment which, in effect, overturned that decision.

As for the sovereign immunity of a state in its own courts, the common law principle was carried from England to America during the 19th century. By 1871, a number of state courts held that the state could not be sued in its own courts without its consent.[8] Interestingly enough, a number of states even embedded the doctrine of sovereign immunity into their own constitutions during the 19th century. Most of these state constitutions provided that suits could be brought against the state only in such manner and in such courts as the state legislature provided.[9]

More significantly, this Court recognized the common law doctrine of state sovereign immunity to bar suits against states without their consent in all courts. In particular, Justice Taney stated:

---

[8] *Turner v. State,* 27 Ark. 337 (1871); *Hunsaker v. Borden,* 5 Cal. 288 (1855); *Tracy v. Hornbuckle, 8 Bush* 336 (Ky. 1871); *Westin v. Dane,* 51 Me. 461 (1862); *Michigan State Bank v. Hastings, 1 Dougl.* 225 (Mich. 1844); *Myers v. Zanesville and M. Turnpike Co.,* 11 Ohio 273 (1842); *Williams v. Register,* 3 Tenn. 214 (1812); *Marshall v. Clark,* 22 Tex. 23 (1858).

[9] Arkansas—Art. I, § 17 (1868); California—Art. XI, § 11 (1849); Indiana—Art. IV, § 24 (1851); Kentucky—Art. VIII, § 6 (1850); Pennsylvania—Art. IX, § 11 (1838); South Carolina—Art. XIV, § 4 (1868); Tennessee—Art. I, § 17 (1870). A few states even prohibited by their constitutions, any suits against the state. *See* Alabama—Art. I, § 15 (1875); Illinois—Art. IV, § 26 (1870); West Virginia—Art. VI, § 35 (1845).

> It is an established principle of jurisprudence in all civilized nations that *the sovereign cannot be sued in its own courts, or in any other, without its consent and permission;* but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state. (Emphasis added).

Beers v. Arkansas, 61 U.S. 991, 992 (1858).

Thus, by 1871, it was generally accepted that states could not be sued in federal or state court without their consent.[10] The Eleventh Amendment and more importantly, the common law doctrine of state sovereign immunity barred such suits, with the exception of those suits expressly authorized by the Constitution, *i.e.* states against states. Moreover, until Reconstruction, Congress had yet to enact any legislation granting jurisdiction to federal courts to hear cases involving federal questions, much less any explicit authority to entertain actions against states or their officers. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 290 (Brennan, J., dissenting). The enactment of § 1983 authorized federal courts to hear civil cases involving deprivation of constitutional rights; however, since states could not be sued in either state or federal court because of state sovereign immunity and the Eleventh Amendment, it is difficult to conceive that Congress intended to abrogate the sovereign immunity of states—

[10] It must also be remembered that the fiction of a "state official in his/her official capacity" was not judicially recognized until 1908 by this Court in *Ex Parte Young,* 209 U.S. 123 (1908); therefore, a suit against a state official in 1871 had no effect on a state's sovereign immunity.

either common law or Eleventh Amendment—by the use of the ambiguous term "person".[11]

Secondly, amici states contend that oral testimony of congressmen during legislative debates, unless very precisely directed to the intended meaning of particular words, are of little value in determining the meaning of those words. None of the legislators' statements cited by the petitioner in his brief provide any aid at all in determining whether Congress intended states to fall within the definition of "person" under § 1 of the Civil Rights Act of 1871. In fact, most of the cited statements in the petitioner's brief relate to arguments made by congressmen regarding the authority of Congress to enact §§ 2 through 6 of the Civil Rights Act of 1871. The lack of testimony regarding § 1 could not be a basis for relying upon testimony of other sections in the Act in attempting to determine the meaning of the term "person" in § 1.

The petitioner also claims that since "Congress considered a state to be a corporation, it understood that remedies against state officers implicated the state." Petitioner's Brief, p. 17. This argument relies on general

[11] Of course, this Court's decision in *Hans v. Louisiana,* 134 U.S. 1 (1890), clearly established the Eleventh Amendment as a bar to actions against states in federal court. Even though the language of the Eleventh Amendment technically only reversed the *Chisholm* decision, the *Hans* Court was correct in concluding that "can we suppose that when the Eleventh Amendment was adopted, it was understood to be left open for citizens of the state to sue their own state in federal courts while the idea of suits by citizens of other courts or of foreign states was indignantly repelled?" *Id.* at 15. It is arguable that instead of broadening the 11th Amendment, *Hans* in fact recognized the applicability of the common law doctrine of state sovereign immunity to federal courts. *See Hans v. Louisiana,* 134 U.S.

(Continued on following page)

statements of individual legislators which are not controlling as to legislative intent. Moreover, amici states would assert that it was well established early in this country's history that states were generally not considered corporations. In his dissent in *Chisholm*, Justice Iredell stated the following:

> The differences between such corporations, and the several States in the Union, as relative to the general Government, are very obvious in the following particulars. 1st. A corporation is a mere creature of the King, or of Parliament. It owes its existence, its name, and its laws, to the authority which create it. A State does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: The voluntary and deliberate choice of the people. 2d. A corporation can do no act but what is subject to the revision either of a Court of Justice, or of some other authority within the Government. A State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless in the special instances were the general Government has power derived from the Constitution itself. 3d. A corporation is altogether dependant (sic) on that Government to which it owes its existence. Its charter may be forfeited by abuse. Its authority may be annihilated, without abuse, by an act of the Legislative body. A State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon it. The people of the State created, the

(Continued from previous page)

at 21 (Harlan, J., concurring) (Suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends, unless the state itself consents to be sued.)

> people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the republican form.

Chisholm v. Georgia, 2 Dall. at 446.

The debates of the 42nd Congress are of little aid in determining the meaning of the term "person". However, when the Civil Rights Act of 1871 is placed in its historical context, the answer becomes apparent. Congress vested exclusive jurisdiction of § 1 with the federal courts due to the inability of state courts to act in the face of the lawlessness instigated by the Ku Klux Klan in the South. There was no clearly expressed intention by Congress that § 1 apply to the states, meaning that sovereign immunity was not abrogated. Thus, since it was impossible to obtain relief against the state, it is doubtful that Congress intended for § 1 to apply to states without any remedy.[12]

II. THIS COURT'S DECISIONS SUPPORT THE CONCLUSION THAT A STATE OR ITS OFFICERS ACTING IN THEIR OFFICIAL CAPACITY WERE NOT INTENDED BY THE 42ND CONGRESS TO BE PERSONS UNDER 42 U.S.C. § 1983.

In analyzing this Court's decisions subsequent to the enactment of the Civil Rights Act of 1871, it is the position of the amici states that these decisions support the view that Congress did not intend the term "person" to include a state or its officers acting in their official capacity. As

[12] Amici states agree that § 5 of the Fourteenth Amendment authorized Congress to abrogate state sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). However, amici states contend that § 1 does not abrogate such immunity. *Cf., Quern v. Jordan*, 440 U.S. 332 (1979).

has already been discussed, the definitional issue of the term "person" is inextricably intertwined with state sovereign immunity and the Eleventh Amendment. At the time of the enactment of the Civil Rights Act of 1871, states could not be sued without their consent in any court under the common law doctrine of state sovereign immunity and the Eleventh Amendment. Subsequent decisions of this Court support the conclusion that Congress did not intend to expressly abrogate Eleventh Amendment immunity or state common law sovereign immunity for that matter.[13]

In *Quern v. Jordan*, 440 U.S. 332 (1979), Chief Justice Rehnquist writing for the majority[14] stated the following:

> We are simply unwilling to believe, on the basis of such slender 'evidence' that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the states.

Id. at 342. See also *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974).

The petitioner argues that the standard for determining whether the state is a "person" under § 1983 is different and lesser than the requirement that abrogation of the Eleventh Amendment must be clearly expressed in the statute. Based upon this argument, the petitioner concludes that "deciding that a state is a person under § 1983

---

[13] The principle that Eleventh Amendment immunity must be expressly abrogated was most recently restated by this Court in *Welch v. Texas Dep't. of Highways*, 107 S.Ct. 2941, 2945-46 (1987).

[14] Chief Justice Rehnquist's statement was in response to Justice Brennen's argument that this Court's holding in *Edelman v. Jordan*, 415 U.S. 651 (1974) that § 1983 does not abrogate the state's Eleventh Amendment immunity "is most likely incorrect." *Id.* at 340.

in no way affects its Eleventh Amendment immunity or the validity of this Court's decision *Quern v. Jordan*". Petitioner's Brief, p. 36.

This argument ignores the fact that the Eleventh Amendment and state sovereign immunity are intertwined with the definitional issue of "person" under § 1983. Since Congress did not intend to expressly abrogate the Eleventh Amendment by the enactment of § 1 of the Civil Rights Act of 1871, then it follows that it also did not intend to abrogate any common law state sovereign immunity in state court at the time of the enactment in 1871. It must be remembered that in 1871, states could not be sued in any court without their consent unless there was an express constitutional or congressional abrogation of state sovereign immunity. Moreover, amici states have been unable to find any state laws at the time of the enactment of the Civil Rights Act of 1871 that consented for a state to be sued for any similar cause of action. Why would Congress have intended states or their officers to be considered "persons" if no remedy could be obtained in either federal or state court?

Although this Court in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978) held that municipalities were persons for purposes of § 1983, that conclusion does not support petitioner's contention that states or their officers were also intended to be "persons" under 42 U.S.C. § 1983.[15] Much of Justice Brennan's majority opinion in

---

[15] Petitioner argues that in *Monell* this Court held that, absent a clear statement that § 1983 should not apply to municipal corporations, then there was no justification for excluding them. Petitioner then cites a number of other decisions of this Court for the proposition that such a principle also applies to states.

(Continued on following page)

Monell focuses upon the Sherman amendments to the Civil Rights Act of 1871 as related to municipalities. In particular, Justice Brennan, in overruling *Monroe v. Pape,* 365 U.S. 167 (1961) made an in-depth review and analysis of the Sherman amendments.

The Sherman amendments would have held a municipal corporation liable for damage done to the person or property of its inhabitants by private persons who rioted. Cong. Globe, 749 (1871). By rejection of these amendments, the Court in *Monroe* concluded that Congress had decided that it had "no constitutional power to impose any

---

(Continued from previous page)

Petitioner's Brief, pp. 23-24. Such analysis ignores two points. First, the circumstances surrounding the enactment of § 1 of the Civil Rights Act of 1871 indicate that the 42nd Congress did *not* intend for states or their officers to be covered. *See, supra,* pp. 7-14. Second, the cases cited by the petitioner involve circumstances where a state engages in an activity regulated by Congress pursuant to express constitutional authority. *U.S. v. California,* 297 U.S. 175, 185 (1936) (California, by engaging in interstate commerce by rail has subjected itself to the commerce power); *Petty v. Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 278-79 (1959) (By entering into a compact to sue and be sued; joint commission of Tennessee and Missouri subjected itself to suit); *California v. Taylor,* 353 U.S. 553, 568 (1957) (Again California engaging in interstate commerce); *Parden v. Terminal Railway of Alabama,* 377 U.S. 184, 193 (1964) (By operating a railroad, Alabama came under the Federal Employer's Liability Act). In each of these cases, the state engaged in an activity regulated by Congress, pursuant to express constitutional authority and, thereby, waived any sovereign immunity. On the other hand, the present case does not involve a federal regulatory scheme over a legitimate activity, *i.e.* operation of a railroad as it affects interstate commerce, in which a state may or may not engage; rather, Congress, under § 1983 prohibits certain conduct which deprives persons of their constitutional rights by permitting the victim to bring suit against the person who did such harm. There is no legitimate conduct in which a state could engage in order to bring it under the purview of the Civil Rights Act. Thus, these cases are inapplicable.

obligation upon county and town organizations, the mere instrumentality for the administration of state law." *Monroe v. Pape,* 365 U.S. at 190. Justice Brennan refutes this view in *Monell* by showing that Congress' rejection of the Sherman amendments had no effect upon § 1 of the Civil Rights Act of 1871; therefore, the conclusion of the court in *Monroe* was incorrect.

The petitioner's attempt to apply the debates of the Sherman amendments to the question of whether Congress intended states to be persons under § 1 of the Civil Rights Act of 1871, ignores the fact that states, unlike municipalities, are clothed with Eleventh Amendment immunity. Without such immunity, § 1 of the Civil Rights Act of 1871 can be applied to municipalities without the necessity of express abrogation of the Eleventh Amendment. On the other hand, in the absence of express abrogation of Eleventh Amendment or state common law sovereign immunity by Congress, no remedy was available against the State or its officers in 1871. Thus, the debates of the Sherman amendments are of little help on this issue.

Application of the prospective compliance exception in *Ex parte Young,* 209 U.S. 123 (1908) to § 1983 cases involving injunctive relief against state officials in their official capacity[16] does not mean that state officers acting in their official capacity are "persons" under § 1983. In *Ex parte Young,* this Court created a judicial exception to

---

[16] In *Hutto v. Finney,* 437 U.S. 678 (1979), this Court stated that "although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities." *Id.* at 690.

the doctrine of sovereign immunity where prospective injunctive relief was to be afforded against a state official to compel him to comply with the Constitution. In particular, this Court stated the following:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. at 159.

Thus although suits requesting prospective injunctive relief may be brought against state officials, such suits in reality are not suits against the state but suits to compel that an official conform his or her conduct to the constitution. *Ex Parte Young* also created a legal fiction in which the state official was enjoined in his or her official capacity in order to ensure compliance with the order by that particular individual's successors. However, this Court was careful in *Ex Parte Young* to note that such an action would not offend the sovereignty of the state. *Id.* In any event, this judicially created legal fiction was not in existence in 1871; therefore, its application to § 1983 cases must be done with the recognition that such equity suits are not in reality against the state but against the individual.

This Court has also indicated in *Ford Motor Co. v. Indiana Dept. of Treasury*, 323 U.S. 459 (1945) that when a lawsuit is "in essence one for the recovery of money from the state, the state is the real, substantial party in

interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464[17] Thus, a suit against a state official for money damages which seeks funds from the state treasury is, a suit against the state. If the 42nd Congress did not intend states to be persons under § 1 of the Civil Rights Act of 1871, in light of the Eleventh Amendment and common law doctrine of sovereign immunity, then the same conclusions would apply to actions for money damages against state officials which seek funds from a state treasury.

CONCLUSION

Based upon the foregoing authorities and analysis, the amici states urge this Court to affirm the decision of the Michigan Supreme Court.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General and Reporter
State of Tennessee

*MICHAEL W. CATALANO
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3499

---

[17] More recently, this Court reaffirmed this principle in *Kentucky v. Graham*, 474 U.S. 170 (1985) (Attorneys cannot recover § 1983 fees against the state where settlement was reached against the Kentucky State Police Commissioner because the settlement was against him in his individual capacity, not official capacity, which is barred by the Eleventh Amendment).